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91-1934

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD A. GROBEL,
PETITIONER

v.

LIQUID AIR CORPORATION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Frank P. Hernandez
[Counsel of Record]
4610 Reiger
Dallas, TX 75246
(214) 821-1213

QUESTION PRESENTED

I.

WHETHER PETITIONER MADE A PRIMA FACIE CASE ?

PARTIES

EDWARD A. GROBEL,
Petitioner
LIQUID AIR CORPORATION,
Respondent

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PETITION FOR WRIT OF CERTIORARI
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APPEALS FOR THE FIFTH CIRCUIT

Edward A Grobel petitions for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on February 28, 1992 affirming the judgment of the District Court. (Appendix A). The judgment of the District Court was issued on July 25, 1991, granting Judgment Notwithstanding The Verdict and dismissing Petitioners claims. (Appendix B).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U. S. C. § 1331 and 28 U. S. C. § 1343 (1)-(4).

APPLICABLE FEDERAL QUESTION

Whether Petitioner met the standards in establishing a *prima facie* case under the Age Discrimination In Employment Act?

STATEMENT

Petitioner Edward A Grobel filed his original complaint as a civil action in the

Northern District of Texas seeking damages suffered by Petitioner caused by Respondent's violation of Petitioner's civil rights under the Age Discrimination In Employment Act of 1967, 29. U.S.C. 626, *et. seq.* The District Court issued its Final Judgment on July 25, 1991, granting a Motion For Judgment Notwithstanding The Verdict. (Appendix B) The jury had answered the questions submitted finding that the Respondent used Petitioner's age as a determing factor in his discharge, acted willfully under the ADEA and awarded Petitioner $142,500.00 for past loss wages and $116,750.00 for loss of future wages.

Petitioner appealed to the Fifth Circuit Court of Appeals and the judgment of the District Court was affirmed on February 28, 1992. (Appendix A)

REASONS FOR GRANTING THE WRIT

The Respondent was charged with wrongful termination based on age discrimination. At the close of the Petitioner's case the Respondent moved for a directed verdict which was denied. Again, at the close of all the evidence the Respondent moved for a directed verdict on the basis that Petitioner had failed to prove a *prima facie* case. The Trial Court denied Respondent's motion and allowed the case to go to the jury. The jury found that age had been a determinative factor in Petitioner's termination and that the Respondent had acted willfully contrary to the ADEA. The Respondent then moved for Judgment Notwithstanding The Verdict, which was granted by the Trial Court.

STANDARD OF REVIEW ON APPEAL FROM JUDGMENT NOTWITHSTANDING THE VERDICT.

The only issue that the Trial Court and the Appellate Court could consider was whether or not the Petitioner proved a *prima facie* case of wrongful termination based on age discrimination in a reorganization scenario using the standards of *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F. 2d 633 (5th Cir. 1985) and *Williams v. General Motors Corp.*, 656 F. 2d 120, (5th Cir. 1981).

At the close of the evidence Respondent's counsel moved for a directed verdict on the basis that Petitioner had failed to establish a *prima facie* case. The motion was as follows:

"MR. BUCKMAN: Defendant Liquid Air Corporation would move for a directed verdict and ask the court to direct a verdict answering Question No. 1, no, based on our preview of the court's form of verdict that you will submit to the jury.

And the basis of the motion is that plaintiff has failed to establish a prima facie case, and there is no justification for submitting the case to the

jury. And I respectfully ask the court to direct a verdict."

On April 24, 1991 the jury entered its verdict. (Appendix C).

On July 25, 1991, the Trial Court entered its Memorandum Opinion And Order wherein it stated:

"The court has concluded that the main ground of defendant's motion is meritorious -- the case should not have been submitted to the jury because the evidence did not raise for jury determination an issue as to whether age was a determinative factor in the discharge of plaintiff."

The Trial Court correctly relied on *Boeing Co. v. Shipman,* 411 F. 2d 365, 374-75 (5th Cir. 1969) which sets out the proper standard for review of a Motion For Judgment Notwithstanding The Verdict. *Boeing Co.* held:

"On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most

favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair - minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh

conflicting evidence and inferences, and determine the credibility of witnesses."

The Fifth Circuit Court Of Appeals is governed by the same standard in reviewing the Trial Court's decision to grant Respondent's Motion For Judgment Notwithstanding The Verdict. *Worthington Corp. v. Consolidated Aluminum Corp.*, 544 F. 2d 227 (5th Cir. 1976). In applying this standard both the Trial Court and the Court Of Appeals are limited in their consideration to those issues that have been properly preserved via a directed verdict for review under Rule 50 of the Federal Rules of Civil Procedure. *Western Oil Fields, Inc. v. Pennzoil United, Inc.*, 421 F. 2d 387 (5th. Cir 1970). Therefore, the only issue properly before the Court of Appeals via Respondent's Motion For Judgment Notwithstanding The Verdict was whether the Petitioner proved a *prima facie* case since this was the only issue which Respondent advanced in its Motion For Directed Verdict. *Glazer v. Glazer*, 374 F. 2d 390 (5th Cir. 1967)

Therefore, the only issue this Court can consider is whether or not Petitioner proved a *prima facie* case.

STANDARD IN PROVING A PRIMA FACIE CASE IN A REORGANIZATION SCENARIO

An employee may prove a *prima facie* case of age discrimination under the ADEA by producing circumstantial evidence that yields an inference age was a factor which made a difference in his termination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985). The circumstantial evidence required to prove a *prima facie* case will change depending on the facts of the particular case. *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 93 S. Ct. 1917, 36 L. Ed. 2d 668 (1973). There is no rigid standard formula for proving a *prima facie* case. *United States Postal Service Board of Governors v. Aikens*, 460 U. S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983).

In analyzing the question of whether Petitioner proved a *prima facie* case the Trial Court relied on Sixth Circuit law, *Ridenour v. Lawson Co.*, 791 F. 2d 52,57 (6th Cir. 1986) not Fifth Circuit law, and held the Petitioner to a higher burden of proof than a plaintiff in an ordinary discharge case is held to because the Petitioner claimed he was terminated as a result of a corporate reorganization. Petitioner contends it was error for the Trial Court to do so. A clarification of the proof needed to establish a *prima facie* case in a reorganization or divestiture situation is needed and for that reason alone this writ should be granted.

The Fifth Circuit has recognized that the Sixth Circuit standard is in error. While discussing *Williams v. General Motors Corporation*, 656 F. 2d 120 (5th. Cir. 1981) *cert. denied*, 455 U. S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982) in *Thornbrough v. Colombus And Greenville R. R. Co.*, 760 F. 2d 633 (5th. Cir. 1985), the Court stated:

"The principal novelty of the *Williams* test is its third requirement. At first glance, this requirement may seem to represent a considerable heightening of the proof required for a *prima facie* case. In a non-reduction in force suit, the plaintiff must make only a minimal showing to establish this aspect of his *prima facie* case: He must simply show that he was discharged from a position which he was qualified for, and that he was replaced by someone outside of the protected class. [Citations omitted] He need not introduce any evidence, either direct or circumstantial, that the employer in fact engaged in intentional discrimination; instead, discrimination is presumed from his replacement. By contrast, under the *Williams* version of a *prima facie* case, the plaintiff must produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it. Specifically, the evidence must lead the fact finder reasonably to conclude either (1) that defendant consciously refused to consider retaining or relocating a plaintiff because of

his age, or (2) that defendant regarded age as a negative factor in such consideration." *Thornbrough* at p. 642.

Therefore, in this case, Petitioner had to show a *prima facie* case by establishing (1) that he was over 40 years of age, (2) that he was qualified to do his job, (3) that he was terminated from his job, and (4) that younger employees were treated more favorably than he was. *Thornbrough* at pgs. 643-645.

THE PRIMA FACIE PROOF

Petitioner contends that the first three requirements were proven by the stipulations in the Pre-Trial Order signed by the Trial Court on March 6, 1991. The Pre-Trial Order stated:

"6. ESTABLISHED FACTS

The following facts are established by the pleadings, stipulations or admissions.

(a) Plaintiff was employed by Defendant as a Regional Application Manager until his date of termination, September 8, 1987.

(b) Plaintiff was 50 years of age at the time of his termination.

(c) Plaintiff was technically qualified for the position which he held at the time of his termination."

Respondent provided a substantial amount of evidence legally sufficient to meet the fourth element of his *prima facie* case, that is, that younger employees were treated more favorably than he.

1. Petitioner testified that there was a Sales Manager position in Pheonix available at the time of the divestiture which he was qualified for and which he had inquired about prior to his termination.(R. Vol. II, pgs. 15-16). Petitioner contends he was qualified for this position since he had been a sales manager before becoming a regional applications manager in 1980. (R. Vol. II, pgs. 9-10). Respondent's evidence proved that this position was given to Dick Girdis who was between 30 and 40 years old and who had been an area sales manager for the Respondent in its Los Angeles offices at the time of Petitioner's termination. (R. Vol.II pgs. 80, 89). This younger employee had

lost his job due to the Respondent eliminating all area sales manager positions nationally at or about the same time as the divestiture, although unrelated to the divestiture. (R. Vol. II, pgs. 77-78, 80).

2. Favored treatment evidence was presented which showed there were also positions available in Respondent's Tech Center located in Chicago. Petitioner had inquired about this position prior to his termination. (R. Vol. II, pgs. 17, 19; Vol. III, pgs. 81-82). One of these positions was for Director of Technology and was a normal step up for an applications manager like Petitioner. (R. Vol. III, pgs. 81-82). The Oakland applications manager, Dan Urban, about 40 years of age, was moved into this position. (R. Vol. III, pgs. 81-82, 89).

3. Employee Joe Hirsch, who was part of the original divestiture package like Petitioner, had been offered a transfer to a hydrogen Sales Representative position before the divestiture package was purchased by Tri-Gas. Mr. Hirsch was in his middle thirtys. (R. Vol. II, pg. 20). It

can be reasonably concluded that if Petitioner was qualified for the positions of Sales Manager and Regional Applications Manager that he was qualified for a Sales Representative position.

4. Two other employees, Robert Castle and Donna Dailey, who were terminated at the same time as Petitioner, and who were much younger, were rehired by Respondent and its subsidiary as Sales Representatives. (R. Vol. I, pgs. 162-63; Vol. II, pgs. 22, 110-112). In *Thornbrough*, *supra*, at pgs. 643-44, the Fifth Circuit held that when younger employees were retained and younger employees were hired following a reduction in force such evidence is legally sufficient to support a *prima facie* case. See, also, *Wolfe v. Time, Inc.*, 48 FEP 1230 (SD NY, 1989) which holds that replacement by younger employee after lapse of several months raises sufficient factual question to defeat summary judgment.

5. After his termination, Petitioner applied for a Sales Representative position in Respondent's Cardox Division. When he

was interviewed for the position he was told by Silas McKnight, Respondent's Regional Manager, that the position was really entry level and for someone younger. Petitioner was not hired and the position that had once been held by a 63 year old employee was filled twice, both times by men in their 30's. (R. Vol. II, pg. 62, pgs. 27-29, 93, 99-105). A statement of this magnitude has been found to be directly probative of an intent to discriminate. *Young v. General Foods Corp.*, 840 F 2d 829 (11th. Cir. 1988)

6. Respondent's witnesses testified that they considered Petitioner for a Field Applications position in 1989, but then transferred Tom Milan, a 30 year old, into the position.

7. Respondent's expert witness, Patrick Verschelde, a 40 year old Executive Vice President of the Canadian Division of Respondent, clearly stated Respondent's position when he testified that there was a correlation between how hard a person works and his age. After counsel for Respondent and the Trial Court interjected

and corrected Mr. Verschelde's testimony he changed his statement. (R. Vol. III, pg. 75). The testimony was as follows:

"Q. In your experience with Liquid Air, have you found that there is a correlation at all between how hard people work and how old they are?

A. Yes. There's no question. As I said, it's a very, very competitive market. And to be rewarded, you have to work very, very hard. This is just basic.

Q. I'm having trouble with you, with my ears. I didn't hear you.

A. Maybe it's my accent.

Q. No, I don't want to blame your accent.

THE COURT: Well, I think you all miscommunicated.

MR. BUCKMAN: We may have.

Q.(By Mr. Buckman) Let me restate my question. Listen to my question Mr. Verschelde. Is there connection, any correlation, between how old an employee is and how hard that Liquid Air employee works?

A. Absolutely not. You know, you can be old at 20 years old, and you can be young at 50 or 60 years old. We still have many employee at 65 years old still working very hard for the company."

The attorney and the Judge might have miscommunicated, but this expert's testimony was heard loud and clear by the jury, as is reflected in their verdict.

Stereotypical views of younger persons as more vigorous or better hustlers suggests discriminatory intent and pretext for employer actions. *Brooks v. Woodline Motor Freight, Inc.*, 852 F. 2d 1061, 1064 (8th Cir. 1988).

9.There was conflicting evidence presented as to whether the Respondent had promised Petitioner he would not lose his job over the divestiture. Petitioner testified that he was made this promise by Carl Bandy prior to the actual divestiture. Respondent's witness, Mr. Elder, testified that there was no such promise. The fact remains that Respondent made an actual decision to terminate Petitioner a month after the divestiture and despite the fact that

more than 60 % of his responsibilities and duties remained after the divestiture. (R. Vol. II, pgs. 14-15, Vol. III, pgs. 6-7).

The evidence referred to above clearly demonstrates that Petitioner proved a *prima facie* case.

CONCLUSION

Petitioner moves the Court to grant the Writ of Certiorari and to reverse and remand the judgment of the Court of Appeals and to reinstate the verdict of the jury.

Respectfully submitted,

FRANK P. HERNANDEZ
4610 Reiger
Dallas, Texas 75246
(214) 821-1213
Texas Bar Card No. 09516000
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 91 - 1924
Summary Calendar

EDWARD A. GROBEL,
Plaintiff-Appellant,

v.

LIQUID AIR CORPORATION
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(CA 4-89-615-A)

(February 28, 1992)

Before POLITZ, Chief Judge, , REAVLEY and DAVIS, Circuit Judges.

PER CURIAM: *

We agree with the district judge that the evidence will not support a verdict for plaintiff, and we affirm the judgment.

It was not Liquid Air's decision that plaintiff be discharged. It was the purchaser of Liquid Air's facilities and business operations, Tri-Gas, not a party here, which decided at the last minute to deny employment to plaintiff and four others. Liquid Air had planned and expected for plaintiff to continue with Tri-Gas, but Tri-Gas decided otherwise. If we extend our search for some subsequent decision by Liquid Air that could be characterized as discriminatory and adverse to plaintiff, we do not find it here. Liquid Air was able to rehire one of the employees rejected by Tri-Gas, but that employee was older than plaintiff and the decision was thus clearly foreign to age-based discrimination. Two other employees, younger than plaintiff and rejected by Tri-Gas, were able to obtain

employment, one with a different division of Liquid Air and the other with a subsidiary of Liquid Air's parent corporation. However, the record implicates no decision of this employer to rehire those employees while not rehiring plaintiff. No choices were made adverse to plaintiff -- for reason of age or otherwise.

We find no evidence that plaintiff has been adversely affected by a decision of Liquid Air. If the sale to Tri-Gas, and execution of that agreement, be considered Liquid Air's decision resulting in plaintiff's loss of employment, no discrimination was intended or involved. Plaintiff fails even to make a prima facie case. See Thornbrough v. Columbus and Greenville R. Co., 760 F. 2d 633, 642 (5th Cir. 1985).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORH DIVISION

CIVIL ACTION NO. 4-89-615-A

EDWARD A. GROBEL,	§
Plaintiff	§
v.	§
	§
LIQUID AIR CORPORATION,	§
Defendant	§

MEMORANDUM OPINION AND ORDER

Before the court for determination are defendant's motion for judgment notwithstanding the verdict and alternative motion for new trial.

The Motion for Judgment Notwithstanding the Verdict

As described in the pretrial order, the claims of plaintiff, Edward A. Grobel, are that :

Plaintiff, 50 years old at the time, contends that he was terminated from his employment as a Regional Application Manager on September 8, 1987, in willful violation of the Age Discrimination Act of 1967, 29 U.S.C. Section 626, et seq.
Plaintiff contends he was laid off during a divestiture of the Defendant's Texas operations when the buyer, Tri-Gas declined to hire Plaintiff.

Certain facts are, for all practical purposes, agreed upon by the parties. There is no disagreement that the event that precipitated termination of plaintiff's employment with Liquid Air Corporation, defendant, was a divestiture of business operations of defendant in the State of Texas in response to an order of the Federal Trade Commission. Because of the acquisition by defendant, or its parent corporation, of Big Three Industries, Inc., the FTC ordered defendant to divest itself of a portion of its Texas business.

Defendant put together a "divestiture package," which consisted of the elements, including employees, involved in the segment of its business that was to be divested. It then offered that divestiture package for sale. The employees of defendant, including plaintiff, who were a part of the divestiture package were given special benefits to induce them to remain with the package until the divestiture occurred. Tri-Gas purchased the divestiture package effective August 20, 1987. Until a few days before the transfer of the divested operations from defendant to Tri-Gas, plaintiff and others involved in the transfer assumed that plaintiff would become an employee of Tri-Gas. Business calling cards showing him to be an employee of Tri-Gas were ordered. At the last minute, Tri-Gas decided that it did not want plaintiff as an employee, with the result that he continued as an employee of defendant until formal termination of his employment on September 8, 1987. He had been told on August 17, 1987, the same day he learned that he had been rejected by Tri-Gas, that

he was not going to be retained by defendant. Plaintiff was fifty years of age at the time of his termination.

Also, there is no disagreement that: The business location of defendant, where plaintiff was serving as an employee, became a Tri-Gas office as a result of the divestiture transaction. His supervisor in that office, Mr. Stormer, who was five to seven years older than plaintiff, was one of the employees in the divestiture package who went with Tri-Gas.[1] The divestiture transaction caused plaintiff's employment position with defendant to be eliminated, though certain functions he performed in states in other then Texas still had to be performed by someone. Nearly forty percent of defendant's business as to which plaintiff had duties was no longer there after the divestiture. When plaintiff applied for unemployment benefits, he told the Texas Employment Commission that he was out of work because his position with defendant had been eliminated. No one

[1] By the time of trial Mr. Stormer was deceased.

connected with the divestiture transaction indicated to plaintiff that he lost his job because of his age.

Notwithstanding the undisputed facts mentioned above, plaintiff undertook to prove that age was a determinative factor in his discharge by defendant. He was successful in obtaining a "Yes" answer to the following question that was submitted to the jury as part of a special verdict form used by the court pursuant to the authority of Fed. R. Civ. P. 49(a) :[2]

QUESTION NO. 1:

Do you find from a preponderance of the evidence that age was a determinative factor in the discharge of Edward A. Grobel by Liquid Air Corporation?

You are instructed that the term "determinative factor" means a factor upon which the decision to discharge Mr. Grobel was based; i.e., but for Mr. Grobel's age, he would not have been discharged.

---

[2] In addition, the jury found that the discharge of plaintiff was willful, a dollar amount of loss suffered by plaintiff from the date of his discharge to the date of trial, and, in answer to a question submitted on an advisory basis, a dollar amount as the loss plaintiff will suffer in the future.

ANSWER:

(X) Yes

( ) No

Verdict of Jury, at 1.

At the conclusion of plaintiff's evidence, defendant tendered the making of a motion for directed verdict, and the court informed defense counsel that the motion could be made at a later time but would be deemed to have been made at that time. At the conclusion of all the evidence, defendant made a timely motion for directed verdict, which was deemed by the court to have been made at the end of plaintiff's case as well as at the close of all the evidence. The motion, which was denied by the court, was stated in the record by defense counsel as follows:

MR. BUCKMAN: Defendant Liquid Air Corporation would move for directed verdict and ask the court to direct a verdict answering Question No. 1, no, based on our preview of the court's form of verdict that you will submit to the jury.

And the basis of the motion is that plaintiff has failed to establish a prima facie

case, and there is no justification for submitting the case to the jury. And I respectfully ask the court to direct a verdict.

Tr. Vol. II, at 77.

Upon denial of the motion, the court, by operation of law, reserved decision on the legal questions raised by the motion. See Fed. R. Civ. P. 50(b); McAdams v. Matagorda County Appraisal District, 798 F. 2d 842, 849 n. 6 (5th Cir. 1986). Defendant timely filed a motion for judgment notwithstanding the verdict, as authorized by Rule 50 (b). Defendant's motion reurges the grounds stated by defense counsel for grant of directed verdict, i.e., in effect, that Question No. 1 should not have been submitted to the jury but should be resolved as a matter of law in favor of defendant, resulting in judgment for defendant. In addition, defendant's motion alternatively asks the court (i) to disregard the jury's "Yes" answer to the question asking whether Plaintiff proved that his discharge was willful and (ii) to enter judgment for defendant on the ground

that plaintiff's action is barred by the two-year statute of limitations. The court has concluded that the main ground of defendant's motion is meritorious -- that the case should not have been submitted to the jury because the evidence did not raise for jury determination an issue as to whether age was a determinative factor in the discharge of plaintiff. Because of this conclusion, the court does not need to decide the other grounds of defendant's motion or the legal question as to whether the court has authority to consider those grounds in view of the fact that neither was raised by defendant's motion for directed verdict.

In deciding that defendant's motion for judgment notwithstanding the verdict should be granted, the court has applied the standards and evaluation techniques articulated by the Fifth Circuit:

> On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the

light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions. that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n. o. v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting

evidence and inferences, and determine the credibility of witnesses.
Boeing Co. v. Shipman, 411 F. 2d 365, 374-75 (5th Cir. 1969).

The facts and inferences established by the evidence in this case point so strongly and overwhelmingly in favor of defendant as to the inquiry made by Question No. 1 that reasonable men could not arrive at the "Yes" answer given by the jury to the question. There is an absence of evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach the conclusion from the evidence that age was a determinative factor in the discharge of plaintiff by defendant.

As the court previously has noted, there is no dispute between the parties, or conflict in the evidence, as to the factor that precipitated termination of plaintiff's employment with defendant, i.e. the forced divestiture by defendant of the segment of its business to which plaintiff was assigned as an employee and the consequent elimination of plaintiff's job position. The

court turns now to a consideration of whether there was substantial evidence that, notwithstanding those established facts, age was a determinative factor in the discharge of plaintiff. Plaintiff has put in his response to defendant's motion those parts of the evidence plaintiff claims support a "Yes" answer to Question No. 1.

Plaintiff acknowledges on page 2 of his response that he was obligated to prove as an element of a prima facie case that younger individuals were treated more favorably than he. Then, plaintiff proceeds at pages 2-4 of his response to present the evidence upon which he relies as proof of that fact. The evidence to which plaintiff refers does not constitute even a scintilla of evidence that younger individuals were treated more favorably than plaintiff in respect to the discharge from employment issue. There is no evidence that any employee younger than plaintiff was treated more favorably than plaintiff was treated at or about the time of the FTC-ordered divestiture. To the contrary, the evidence tends to show that defendant treated

employees younger than plaintiff the same way it treated plaintiff -- that is, they were discharged. And, the evidence is undisputed that the only employee older than plaintiff who was rejected by Tri-Gas out of the divestiture package received more favorable treatment. Tri-Gas hired almost all of defendant's Texas employees, but it rejected five. One was plaintiff. Four others were named by plaintiff, Donna Dailey, Robert Castle, Jim ogle, and Ben Day. Mr. Day is older than plaintiff. Mention was made later in the trial of a Johnnie Myers as another employee of defendant who might have been rejected by Tri-Gas. The record is unclear concerning what happened to Ogle and Myers, but apparently both of them voluntarily quit. Of the five employees who were in somewhat the same position as plaintiff (having been rejected by Tri-Gas), only one, Mr. Day, was retained by defendant on its payroll and transferred to another office. Thus, the only "more favorable treatment" was received by an employee older than plaintiff.

The reference by plaintiff a pages 3 and 4 of his response to two of the five rejected employees who later were rehired by defendant (or an affiliated company) is ill-put. First of all, this case was not pleaded, tried or submitted to the jury as a hiring or rehiring discrimination case -- it is a case of alleged discrimination in termination of employment. Secondly, there is no dispute in the evidence that the later hiring of these two persons was purely coincidental and had nothing whatsoever to do with the fact that they had been terminated by defendant because of having been rejected as part of the divestiture package. Employee Castle, who had been employed in Texas, was hired in California through the offices of an employment agency, the services of which cost defendant $10,000.00. The other, Ms.Dailey, was not rehired by defendant, but at a later date sought employment at, and was hired by, Big Three.

Next, at pages 5-6 of his response, plaintiff urges in support of the jury's finding to Question No. 1 evidence that he perceives to establish that he was technically

qualified for the positions other employees of defendant who are mentioned in his response received from time to time. The court does not need to evaluate the merit of this contention because of the total absence of probative evidence of favored treatment in a context relevant to plaintiff's claims.

There was evidence from several sources concerning plaintiff's shortcomings in the performance of his employment duties for defendant and about dissatisfaction with plaintiff, expressed by personnel of defendant, including his now deceased supervisor. This evidence provides articulation of an adequate, nondiscriminatory reason for defendant not transferring plaintiff to another job position once his position was eliminated by reason of the divestiture and plaintiff was rejected by Tri-Gas. However, the court does not need to evaluate the evidentiary strength of this nondiscriminatory reason because its proof did not become essential from defendant's standpoint due to the failure of plaintiff to make proof of a prima facie case. See Thornbrough v. Columbus &

Greenville Railroad Co., 760 F. 2d 633, 638-39, 643-44 (5th Cir. 1985). However, the court is convinced by the evidence that defendant had sufficient nondiscriminatory reasons for not wanting plaintiff as an employee once Tri-Gas rejected him.

There is no evidence in this action that any younger employee affected by the failure of Tri-Gas to accept the divestiture package in its entirety was retained as an employee by defendant. As mentioned above, the only employee in that category who was kept as an employee of defendant was older than plaintiff. In evaluating whether plaintiff made a prima facie case, the court need not, and should not, take into account employment decisions that were made after plaintiff's employment was terminated because those decisions would not have relevance to plaintiff's claim of discriminatory termination of employment. A different case might be presented if there were evidence that post-termination rehires were part of a plan to conceal or obscure a discriminatory discharge, but there is no evidence to that effect, only surmise and

speculation suggested by questions and argument of plaintiff's counsel. Moreover, in addition to not being relevant to plaintiff's discrimination claim, the evidence plaintiff offered on the subject of rehire would not create a prima facie case even if a rehire case had been pleaded, tried and submitted to the jury as a discrimination rehire case. The sketchy evidence pertaining to placement of persons in other jobs is not substantial enough to constitute any evidence that any employee outside the protected class was treated more favorably than plaintiff. Of course, because this action was not pleaded and tried as a rehire case, the court can only speculate as to what defendant would have offered as theories and evidence in response to such a contention.

A plaintiff claiming age discrimination who has been terminated as a result of a corporate reorganization has been said to have a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons. See Ridenour v. Lawson Co., 791 F. 2d 52,

57 (6th Cir. 1986). In the instant action, plaintiff apparently made the conscious decision not to develop statistical evidence in support of his action but, instead, to rely exclusively on what he might be able to provide by his testimony. There is authority that where an employer reduces its work force for economic reasons, it does not incur a duty to transfer an employee to another position within the company. Id.

The nearest thing in the record to evidence of age discrimination is plaintiff's testimony that Art Perkins, a fellow employee, told him that age had something to do with his layoff. There was no evidence that Mr. Perkins had factual basis for whatever he might have said to plaintiff on that subject. An off hand comment such as this by a fellow employee, who was not involved in the decision to terminate plaintiff's employment, does not give rise to a reasonable inference of discrimination. See Mauter v. Hardy Corp., 825 F. 2d 1554, 1558 (11th Cir. 1987); Gray v. New England Telephone & Telegraph Co., 792 F. 2d 251, 254-55 (1st Cir. 1986). In

contrast, there was positive evidence that age played no role in the decision to discharge plaintiff, that his employment was terminated because his job was eliminated, and that he was not transferred to another position because:

A. As I understand it, there was no position which we could identify for Mr. Grobel because he failed to create a demand for himself within the organization; and we could not identify an individual who had a position that wanted to take Mr. Grobel.

Q. So what you are saying is that -- or what you said here is that he -- the defendant's management is not aware of any positions within the corporation that were vacant at the time that plaintiff was layed off for which plaintiff appeared to be best qualified by experience, temperament and evaluations; is that correct? That was your answer?

A. Yes. Basically, that there was not a position we could identify for him, despite his qualifications, because of performance and personality.

Tr., Vol. II, at 7. An employee who was taken by Tri-Gas in the divestiture, and who played a significant role in the transition, expressed the belief, based on his knowledge of the participants, that age was not a factor in plaintiff's job termination.

An application to the evidence in this action of the standards set forth in Boeing v. Shipman, 411 F. 2d 365, 374-75 (5th Cir. 1969), results in the conclusion that defendant's motion for judgment notwithstanding the verdict should be granted.

The Alternative Motion for New Trial

Defendant has joined with its motion for judgment notwithstanding the verdict a motion for new trial, as contemplated by Fed. R. Civ. P. 50(b). The court is obligated to make a ruling on the motion for new trial even though it is granting the motion for judgment notwithstanding the verdict. See Fed. R. Civ. P. 50(c). If the motion for new trial is granted, it will be a conditional grant, to take effect only if the court's ruling on the motion for judgment

notwithstanding the verdict is reversed by the appellate court and the appellate court doe not order otherwise. See Rule 50(c); Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940)

The alternative motion for new trial reurges as its grounds the same grounds that are urged in support of the motion for judgment notwithstanding the verdict plus the added ground that the verdict is contrary to the weight of the evidence. The court can grant a new trial if, in the court's view, the verdict is contrary to the weight of the evidence. See United States v. An Article of Drug Consisting of 4680 Pails, 725 F. 2d 976, 989-90 (5th Cir. 1984); Bazile v. Bisso Marine Co., 606 F. 2d 101, 105 (5th Cir. 1979), cert. denied, 449 U.S. 829 (1980). In the opinion of the court, if the evidence is legally sufficient to support the verdict of the jury in answer to Question No. 1, then the finding of the jury in answer to Question No. 1 is contrary to the weight of the evidence. Therefore, the court conditionally grants the motion for new trial for that reason.

ORDER

For the reasons given above:

The court ORDERS that defendant's motion for judgment notwithstanding the verdict be, and is hereby, granted;

The court further ORDERS that plaintiff, Edward A. Grobel, be denied any recovery from defendant, Liquid Air Corporation, and that plaintiff's claims against defendant be, and are hereby, dismissed;

The court further ORDERS that defendant have and recover costs of court incurred by it from plaintiff; and

The court further ORDERS that defendant's alternative motion for new trial be, and is hereby, granted.

SIGNED July 25, 1991.

JOHN McBRYDE
United States District Judge

APPENDIX C

VERDICT OF THE JURY

We the Jury, return our answers to the following questions as our verdict in this case.

Question No. 1:

Do you find from a preponderance of the evidence that age was a determinative factor in the discharge of Edward A. Grobel by Liquid Air Corporation?

You are instructed that the term "determinative factor" means a factor upon which the decision to discharge Mr. Grobel was based; i.e., but for Mr. Grobel's age, he would not have been discharged.

Answer:

(x) Yes

( ) No

If you have answered Question No. 1 "Yes", answer the remaining questions; otherwise, do not answer any further questions.

Question No. 2:

Do you find from a preponderance of the evidence that the discharge of Edward A. Grobel was willful?

You are instructed that the term "willful" means that Liquid Air Corporation either knew its conduct was prohibited by the Age Discrimination in Employment Act or that it showed reckless disregard for whether its conduct was prohibited by the Act.

Answer:

(x) Yes.

( ) No

In connection with your consideration of Questions Nos. 3 and 4, you are instructed that a plaintiff in an action brought under the Age Discrimination in Employment Act has the duty to make a reasonable effort to find and to retain other employment. The burden is on defendant to prove, by a preponderance of the evidence, that suitable positions were available and the plaintiff failed to use reasonable care in seeking or retaining them. A wrongfully discharged employee is

not required to seek or retain employment which is not consonant with his particular skills, background, and experience, or which involves conditions that are substantially more onerous than his previous position. In other words, the plaintiff is not required to accept or retain anything other than suitable employment.

Question No.3:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Edward A. Grobel for earnings and fringe benefits, if any, that he has lost up to this date from the date of his discharge.

Answer in Dollars and Cents or "None."

Answer:

$ 142,500.00

Question No. 4:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Edward A. Grobel for earnings and fringe benefits, if any, that he will lose in the future?

Answer in Dollars and Cents or "None."

Answer:

$ 115, 750.00

4/24/91 Foreperson

4/24/91 John McBryde, Unit d States District Judge

AFFIDAVIT OF COUNSEL AS TO MAILING PETITION OF WRIT OF CERTIORARI

I, Frank P. Hernandez, Counsel for Edward A. Grobel, Petitioner, swear that the foregoing Petition was deposited in the United States mail with the proper postage, prepaid, on May ___, 1992.

_____

Frank P. Hernandez

STATE OF TEXAS §
COUNTY OF DALLAS §

SWORN TO AND SUBSCRIBED before me, a notary public, by the said Frank P. Hernandez, on this the ___day of May 1992, to certify which witness my hand and seal.

_____

Notary Public in and for
The State of Texas

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I hereby certify that a correct copy of this Petition was mailed to Donald K. Buckman, Cantey & Hanger, 2100 Burnett Plaza, 801 Cherry Street, Fort Worth, Texas, 76102, attorney for Respondents on this the ___day of May, 1992.

_____

Frank P. Hernandez

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

(2)

No. 91-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD A. GROBEL, *Petitioner,*

v.

LIQUID AIR CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Respondent's Brief in Opposition to Petition for Certiorari

DONALD K. BUCKMAN
Counsel of Record
Cantey & Hanger, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102
(817) 877-2882

Counsel for Respondent

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Both courts below held (in unpublished opinions and without dissent) that Petitioner Grobel failed to establish a prima facie case that respondent Liquid Air Corporation unlawfully terminated his employment because he was 50 years old. Grobel's Petition asks this Court to review the evidence and to determine whether he did or did not make a prima facie case.

Grobel's termination resulted from a Federal Trade Commission-ordered sale of most of Liquid Air's Texas operations. The lower courts accordingly examined the case pursuant to the reduction-in-force scenario. Grobel asserts this analysis was erroneous, but Liquid Air believes it was eminently correct.

The judgments of the courts below do not conflict with holdings of this Court or of other circuits. The case does not satisfy the exacting standards of this Court's Rule 10.1: "special and important reasons" for granting certiorari are not found in this case, which presents a fact-specific question.

LIST OF PARTIES

As named in the caption, petitioner Edward A. Grobel and respondent Liquid Air Corporation are the only parties in this case.

L'Air Liquide (a French corporation) is the parent of Liquid Air Corporation. Liquid Air has no subsidiaries other than wholly owned subsidiaries.

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No. 91-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD A. GROBEL, *Petitioner,*

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LIQUID AIR CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari
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for the Fifth Circuit

Respondent's Brief in Opposition to Petition for Certiorari

JURISDICTIONAL STATEMENT

Respondent Liquid Air Corporation challenges the Jurisdictional Statement contained in Grobel's Petition, at 7.

Petitioner cites two statutes, presumably in response to the requirement in this Court's Rule 14.1(e)(iv) that a petition for a writ of certiorari contain "[t]he statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari."

Petitioner's Jurisdictional Statement invokes only 28 U.S.C. §§ 1331 and "1343 (1)-(4)." Respondent presumes that the latter reference is an error and should have been to 28 U.S.C. § 1343(a) (1)-(4).

Both cited statutes confer jurisdiction on *district* courts, not on this Court. Both are quoted in relevant part here:

> The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.

28 U.S.C. § 1331.

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person [alleging the deprivation of certain civil rights].

28 U.S.C. § 1343(a).

Nor does Grobel's Petition comply with Rule 14.1(e)(i)-(ii), which requires a jurisdictional statement to contain the date of the entry of the judgment sought to be reviewed.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Liquid Air terminated Grobel when his job was eliminated as a result of a Federal Trade Commission order that Liquid Air divest most of its industrial gases business in Texas. Grobel was only 50 years old when he was terminated.

Liquid Air had informed Grobel and approximately 110 other Texas employees of the proposed divestiture 10 months in advance. Tr. [trial transcript] I-14. As part of a package to be sold, Grobel well knew that his employment with Liquid Air soon would end.

Liquid Air reorganized. The divestiture package became a temporary corporation called NuCorp. Grobel's duties in states other than Texas (about 40% of his job) were reassigned

to his counterparts in other regions. Tr. II-33-34. Grobel did not then claim any age discrimination.

A small new company, Tri-Gas, bought NuCorp, which essentially was Liquid Air's "air gases" (nitrogen, oxygen, and argon) former operation in Texas. The owners of Tri-Gas decided not to hire Grobel and four other former Liquid Air employees. That decision (but not the reason for it) was made and announced only a few days before Tri-Gas opened for business in August of 1987. Tr. II-36. Still Grobel said nothing to protest age discrimination.

Effective September 8, 1987, Liquid Air listed Grobel as terminated from employment but provided generous severance benefits. Plaintiff's Exhibit No. 3. Grobel's $48,000 salary and fringe benefits continued for six months. He also received unemployment compensation. Tr. I-68, 74-75.

Not until near or after the end of the allowable 300-day filing period did Grobel finally submit an age discrimination charge to the Equal Employment Opportunity Commission. In his charge Grobel said that Liquid Air had terminated him because of his age. The EEOC dismissed the charge because, as Grobel admitted, the agency "could not find that there was age discrimination." Tr. I-48-49. Neither then nor later did Grobel complain that Tri-Gas failed to hire him because of his age or otherwise. Nor has Grobel claimed that Liquid Air had anything to do with the decision of Tri-Gas not to accept him.

At trial the thrust of Grobel's case was that, because of his age, Liquid Air didn't manufacture or find a spot for Grobel after the divestiture to Tri-Gas.

Both courts below found it very significant that Tri-Gas also rejected an *older* Liquid Air employee, Ben Day. When Liquid Air learned that unexpected news, it transferred Day to another region. Tr. II-21. Grobel's Petition does not once mention this critical fact.

Day, six years older than Grobel, was the only Liquid Air Texas employee whom Liquid Air did not terminate as a result of the divestiture!

A jury in the Northern District of Texas, after a two-day trial in 1991, decided that Grobel's age was a "determinative factor" in his discharge, and the jury labeled the discharge "willful." The jury found damages for past and future lost income.

Liquid Air timely moved for directed verdict at trial, denying that Grobel's evidence established a prima facie case of age discrimination. Tr. II-97.

After the verdict was returned, Liquid Air submitted a timely motion for judgment notwithstanding the verdict, still insisting that Grobel had failed to prove a prima facie case. R. [record] 111. The trial court (McBryde, J.) granted that motion. R. 155. Also it conditionally granted Liquid Air's alternative motion for new trial on the grounds that the verdict was contrary to the great weight of the evidence. *Id.*

In a short *per curiam* ruling, the Court of Appeals for the Fifth Circuit affirmed (Politz, C.J., and Reavley and Davis, J.J.). Citing a solitary case, the panel wrote: "Plaintiff [Grobel] fails even to make a prima facie case." Appendix A to Pet. at 27.

Grobel seeks a discretionary writ of certiorari so that this Court may review the lower courts' unanimous rulings. Liquid Air opposes Grobel's Petition.

SUMMARY OF THE ARGUMENT

Grobel's Petition incorrectly maintains that the Fifth Circuit erroneously demanded *more* proof from him because he was terminated in a reduction-in-force (RIF) scenario. Liquid Air's argument explains Grobel's error, illustrates the correct-

ness of the judgment of the court of appeals, and concludes that this Court should deny certiorari.

Grobel failed to prove two ingredients of a prima facie case of age discrimination in the RIF scenario that this lawsuit presents.

In the Fifth Circuit, a RIF plaintiff must prove, among other things, that the employer treated younger persons more favorably at or about the time that the plaintiff claims to have been the victim of age discrimination. *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 812-13 (5th Cir. 1991).

First, Grobel failed to produce such proof. In fact, Liquid Air proved that it treated *all* of its Texas air gases employees the same: they were packaged and offered for sale as the FTC mandated. The buyer, Tri-Gas, accepted some 100 employees in the package but rejected Grobel and four others. The inquiry must focus on those five persons. Liquid Air treated one of them more favorably than the others by transferring him. But he was the *oldest* in the group! Liquid Air then terminated Grobel and all others rejected by Tri-Gas.

Secondly, Grobel failed to prove that he was qualified for any position within Liquid Air outside the divested region. Proof of such qualification is another requirement of a prima facie case. *Id.* at 812.

ARGUMENT

Grobel Was Not Held to an Erroneously High Burden of Proof

Grobel hints at but does not squarely set out a conflict between the Fifth Circuit and the Sixth Circuit in arguing that certiorari should be granted. Pet. at 15.

No such conflict exists. Grobel is in error in asserting that the trial court relied on Sixth Circuit law in analyzing whether

Grobel established a prima facie case. When the Fifth Circuit decided Grobel's appeal, it neither looked to the Sixth Circuit opinion nor even commented on Grobel's argument on this point.

In his opinion granting judgment for Liquid Air notwithstanding the verdict, the trial court correctly cited *Ridenour v. Lawson Co.*, 791 F.2d 52 (6th Cir. 1986), for the proposition that an ADEA plaintiff in a reduction-in-force scenario has "a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons." Appendix A to Pet. at 43.

Grobel illogically argues that "the Fifth Circuit has recognized that the Sixth Circuit's standard is in error." Pet. at 15. Grobel's reasoning is flawed. Grobel argues that the Fifth Circuit's recognition of the Sixth Circuit's "error" is found in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985). This obviously is impossible because *Thornbrough* was decided a year before *Ridenour*.

More importantly, Grobel's excerpt from the discussion in *Thornbrough* of *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655, 102 S. Ct. 1439 (1982), omits this clarification:

> An argument could be made that *Williams* eased rather than heightened the burden on employment discrimination plaintiffs by eliminating the necessity of showing actual replacement by a younger worker; instead *Williams* allows employees to establish a prima facie case through any type of circumstantial evidence that younger employees were more favorably treated than older employees.

Thornbrough, 760 F.2d at 642-43.

Even more significantly, since *Ridenour* was decided in 1986, the Fifth Circuit has emphasized anew the differences between elements of prima facie age discrimination cases in RIF situations and in ordinary scenarios. *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805 (5th Cir. 1991). Many other circuits have recognized the-same distinction between the two types of age discrimination cases. *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045-46 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064, 107 L. Ed. 2d 1012, 110 S. Ct. 884 (1990); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (summary judgment for employer affirmed); *Palmer v. United States*, 794 F.2d 534, 537 (9th Cir. 1986) (prima facie case not established); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165 (8th Cir. 1985) (prima facie case not established); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.), *cert. denied*, 464 U.S. 994, 78 L. Ed. 2d 683, 104 S. Ct. 488 (1983).

In either scenario, the Fifth Circuit has stated, "a prima facie case is fairly easily made out." *Amburgey*, 936 F.2d at 812. Nevertheless, as the courts below recognized, Grobel failed to do so.

Grobel Did Not Prove That Younger Employees Were Treated More Favorably

The courts below recognized that Grobel's evidence failed to prove that Liquid Air provided better treatment to the employees younger than Grobel who had been expected to be acquired by Tri-Gas but who were turned away by Tri-Gas, just as Grobel was.

At least three Fifth Circuit cases establish that an age discrimination plaintiff, to prove a prima facie case in a reduction-in-force scenario, must proceed differently from the requirements established for other age discrimination cases. *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805

(5th Cir. 1991); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985); *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655, 102 S. Ct. 1439 (1982). Taken together, these cases teach that a RIF plaintiff must show that younger employees received more favorable treatment. In a typical (non-RIF) case, a plaintiff must prove that someone younger replaced him.

Focusing on this issue, the Court of Appeals for the Fifth Circuit stated in its succinct ruling on Grobel's appeal:

> Liquid Air was able to rehire one of the employees rejected by Tri-Gas, but that employee was older than plaintiff and the decision was thus clearly foreign to age-based discrimination.

Appendix A to Pet. at 26.

Grobel testified that Donna Dailey, Robert Castle, Jim Ogle, and Ben Day were the other Texas Liquid Air employees whom Tri-Gas, at the last minute, did not accept. Tr. I-22.

Carmen Parent, Liquid Air's manager of employee relations and equal employment opportunity, testified as an adverse witness. She identified the Liquid Air employees whom Tri-Gas elected not to accept as Grobel, Dailey, Castle, Day, and Johnny Myers, but not Ogle. Tr. I-108. The discrepancy between the two lists was not resolved. Parent produced Plaintiff's Exhibit No. 3, containing data about the five employees whom Tri-Gas waved off. The information contained in Plaintiff's Exhibit No. 3, because of its importance, is reproduced here:

Name	Title	Birth Date	Hire Date	Termination Date
Castle, Robert M.	Sr. Sales Rep.	12/17/59	11/25/85	09/08/87
Dailey, Donna C.	Reg. Sales Assis.	10/22/51	10/01/74	09/18/87
Day, Ben J.	Reg. Dist. Mgr.	01/17/31	06/26/57	transferred to SE Region
Grobel, Edward A.	Reg. Applic. Mgr.	01/09/37	03/07/66	09/08/87
Myers, Johnnie J.	Reg. Dist. Mgr.	01/31/37	10/22/84	04/30/87

The most important employee on the list, Liquid Air submits, is Ben Day. Grudgingly Grobel testified that "Ben Day was my age or older." Tr. I-23. Plaintiff's Exhibit No. 3 establishes that Day actually is *six years* older than Grobel.

It is undisputed that Liquid Air transferred Day to another regional office. Liquid Air did so only after the surprising news that Tri-Gas would not hire Day.

It is incredible for Grobel to insist that Liquid Air treated younger employees more favorably when Day, six years older than Grobel, is the only employee who was treated more favorably than Grobel. In his Petition, Grobel totally ignores this problem by treating Day as if he didn't exist. Grobel concentrates his argument on Castle and Dailey as well as events completely unrelated to the FTC-mandated divestiture. Grobel argues that Liquid Air treated Castle and Dailey, who are younger than Grobel, more favorably because although they initially were terminated, they later were rehired.

At trial, Grobel was unable to testify about Dailey or Castle because he lacked personal knowledge. Carmen Parent of Liquid Air testified without contradiction that Liquid Air termi-

nated Dailey, who "subsequently found employment on her own through answering of a newspaper advertisement of Big Three industries." Tr. I-111-112. (It was L'Air Liquide's acquisition of Big Three that triggered the FTC order for Liquid Air to divest most of its Texas operations.) Parent explained that Liquid Air and Big Three operate independently. Parent testified in response to Grobel's attorney's questions:

> Q. Again, it was just a sheer coincidence that Donna Dailey was also rehired?
> A. Yes. We had nothing to do with her application to Big Three or her subsequent hire.
> Q. She wasn't told by anybody at Liquid Air to go and apply for a position at Big Three?
> A. To my knowledge, she answered an advertisement in the newspaper for a job that they were looking to fill.

Tr. I-112-113.

Grobel's trial counsel similarly interrogated Parent about what happened to Castle after Liquid Air terminated him. (Grobel erroneously testified that Castle voluntarily quit. Tr. I-22-23.)

> Q. And what was the process? How did that happen?
> A. As I understand it, after Mr. Castle became unemployed, he submitted his [candidacy] to various employment agencies. And it so happened, very coincidentally, at the same time or around the same time that he was looking for a position that Liquid Air had a sales rep position on the west coast in California; and that opening was listed with a sales consultant agency for local hire. And it was by sheer accident that the agency in California happened to get in touch with the agency in Texas where Mr. Castle had registered his [candidacy], and he ended up being reemployed through this agency and relocated

> himself to California. And Liquid Air incurred some pretty stiff agency fees in the process of rehiring a former employee.

Tr. I-110.

Patrick Verschelde, a Liquid Air executive, told the jury that when he managed the company's western region (which was not involved in the divestiture in Texas), he hired Castle through an employment agency that charged a $10,000 fee. The agency told Verschelde, who had a vacancy for a sales representative position that ranked far lower than Grobel's, that it had a candidate from Houston who previously had worked "with a gas company." Not until too late did Verschelde learn that Liquid Air was that gas company. Tr. II-79.

The jury was not free to reject evidence that Dailey and Castle, after being terminated by Liquid Air, found other positions through their own efforts and coincidence, because Grobel offered *no* contrary evidence.

Neither the Fifth Circuit opinion nor Grobel's Petition mentions Liquid Air employees Ogle and/or Myers. Grobel did not testify about Myers at all, and he lacked personal knowledge of what happened to Ogle. The trial court essentially disregarded those one or two employees who did not go to work for Tri-Gas because "apparently both of them quit." R. 162. Certainly Grobel offered no evidence that Liquid Air treated either or both of those younger employees more favorably than it treated Grobel.

Grobel proved no more than the admitted fact that Dailey and Castle are younger than he. Grobel did not deny that they qualified for the jobs that they found with Big Three and Liquid Air. Grobel did not apply for or claim to be qualified for either position. He did not claim entitlement to "bump" Dailey or Castle because of seniority or otherwise. Grobel did not

prove or even argue that Liquid Air hired anyone from outside the company when he was terminated. The inadequacy of Grobel's case is apparent in comparison to the facts in a leading Fifth Circuit age discrimination reduction-in-force case, *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985):

> [T]he only evidence offered by Thornbrough in support of his claim of age discrimination was that several younger, allegedly less well-qualified employees were retained during the Railroad's reduction-in-force, and that, at the time of his discharge, two younger, allegedly less well-qualified employees were hired.

Id. at 643.

Grobel Did Not Prove That He Was Qualified for Any Other Position That Was Vacant When He Was Terminated

Because Grobel's layoff resulted from the divestiture or reduction in force, another element of his prima facie case was that he was qualified for some other position. Contrary to Grobel's Petition at 17-18, Liquid Air assuredly did *not* stipulate to Grobel's qualifications for such a position. Instead, Liquid Air recognized and stipulated in the pre-trial order that Grobel was *technically* qualified for the position that he had held and that was eliminated, regional applications manager. R. 49.

At trial, Grobel alone testified that he qualified for other jobs within the company:

> Q. What was your response to that information [that he was to be terminated]?
> A. My response was that there were jobs open within Liquid Air that I wanted.
> Q. Were you qualified for these positions?
> A. *I felt I certainly was.*

Tr. I-15, emphasis added. Such self-serving testimony is insufficient:

> GM further suggests that merely because a plaintiff testifies he was capable of handling one or two or many salaried jobs other than his own, yet was not relocated to such a job during the reduction, is not enough to show violation of the ADEA. We agree with this argument in principle and accordingly reverse on this point.

Williams, 656 F.2d at 129. *See also Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1223 (7th Cir. 1991).

Moreover, Liquid Air presented evidence that Grobel was *not* the best qualified person (assuming that he applied) for the very few positions in question.

The jury knew from Liquid Air's evidence that Grobel's former supervisor at Liquid Air, Hugh Stormer (who died before trial), had stated in a memorandum that Grobel lacked initiative, drive, resourcefulness and innovativeness, and had a negative attitude. Tr. I-119; Plaintiff's Exhibit No. 1i.

Lee Elder, a former co-worker of Grobel's who at the time of trial was employed by Tri-Gas, testified at the trial. Elder told the jury that Grobel did not work hard, usually left early each day, and voluntarily relinquished a spacious, prestigious office and moved to a small office near the rear of Liquid Air's space so that their boss, Stormer, wouldn't see Grobel leave early through the back door. Tr. II-44-47. Grobel readily admitted leaving early most days to get a jump on rush hour traffic. Tr. II-93.

Patrick Verschelde at the time of trial was a Liquid Air executive. He testified about a customer visit that he and Grobel had made a few years previously. It concluded in mid-afternoon. Grobel announced that he was through for the day and was going home for a drink and a swim. Verschelde

declined Grobel's invitation to join him and continued working. Tr. II-68. On another occasion, Verschelde testified, Grobel refused to meet him at a plant because of the inconvenient time the customer had specified – 3 o'clock in the morning. Tr. II-70.

Grobel's known laziness contrasts sharply with the qualifications of other employees to whom Grobel now compares himself, Dick Gerdes and Dan Urban.

Liquid Air eliminated Gerdes' job as an area sales manager, in which it is undisputed that he "was performing very well." Gerdes was laterally transferred to a job that would have been a promotion for Grobel. Tr. II-80-81. Grobel did not explain to the jury why he considered himself qualified for promotion or for the job that Gerdes received. Urban had received a bonus, signifying superior performance, just before he was reassigned. Accordingly, when a vacancy occurred at the Liquid Air Technical Center, Urban was considered "the best performer and the most qualified person to take that job." Tr. II-82. Again, the only evidence of Grobel's qualifications came from Grobel himself. But he admitted that he had not received a bonus in several years. Tr. I-13.

Grobel's Petition refers to employee Joe Hirsch. The trial judge properly ruled that evidence of Hirsch was irrelevant to Grobel's claim of being terminated because of his age. Grobel claimed that Liquid Air allowed Hirsch to elect whether to be demoted from his regional sales manager position, which was eliminated in the divestiture, to hydrogen sales representative or to remain in the divestiture package. Had he remained in the package, Tri-Gas might have accepted him but could have rejected him as it did Grobel. No evidence was presented that Liquid Air treated Hirsch more favorably because he was

younger than Grobel, nor is there evidence of Grobel's qualification to be a hydrogen sales representative.

Silas McKnight was a manager in the carbon dioxide division of Liquid Air, which was totally separate from the air gases division in which Grobel had worked. McKnight's alleged discriminatory remark to Grobel occurred, if at all, a month *after* Grobel's termination. Tr. I-93-94. In the Fifth Circuit, proof is required that a plaintiff is qualified to assume another position *at* the time of his termination. *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655, 102 S. Ct. 1439 (1982). Even Grobel does not claim that McKnight (who is older than Grobel) had anything to do with his termination. Whatever McKnight said, therefore, is no evidence that Liquid Air treated younger employees better than Grobel, and it has nothing to do with Grobel's qualifications for another position at the time he was terminated.

Grobel devotes much of his Petition to discussing occurrences elsewhere within Liquid Air that happened after and independently of the divestiture that abolished his job. Grobel claims that Liquid Air failed to find a job for him following Liquid Air's forced withdrawal from Texas, although Grobel did not state in his EEOC charge, pleadings, or pre-trial order that Liquid Air denied him a transfer. Liquid Air insists that the Age Discrimination in Employment Act, 29 U.S.C. § 626 *et. seq.*, did not require it to transfer Grobel because he was 50 years old and his job in Texas had vanished in the divestiture. "Where an employer reduces his work force for economic reasons, it incurs no duty to transfer an employee to another position within the company." *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986).

CONCLUSION

The outcome of this case may be monumentally important to Grobel and to Liquid Air, but not to anyone else and certainly not to the jurisprudence of the nation. This overburdened Court cannot be expected to review whether Grobel established or failed to establish a prima facie case of age discrimination in a reduction-in-force setting. Grobel has shown no defect in the judgment of the Court of Appeals for the Fifth Circuit, which affirmed judgment in the trial court for Liquid Air notwithstanding the verdict.

For the reasons set forth above, this case was correctly decided below and does not raise issues that are proper for review on a petition for certiorari.

Respectfully submitted,

DONALD K. BUCKMAN
Cantey & Hanger, L.L.P.
2100 Burnett Plaza
801 Cherry Street
Fort Worth, Texas 76102
(817) 877-2882

Counsel of Record for Respondent